MOTION FILED
DEC 1 0 2001

No. 01-685

In the Supreme Court of the United States

K. DANIEL RUPP,

Petitioner,

v.

DAVID PHILLIPS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MOTION AND BRIEF OF *AMICUS CURIAE* FEDERAL LAW ENFORCEMENT OFFICERS ASSOCIATION IN SUPPORT OF PETITIONER

Eric J. Magnuson,
Counsel of Record
John R. Neve
RIDER, BENNETT, EGAN
& ARUNDEL, LLP
333 South Seventh Street, Suite 2000
Minneapolis, MN 55402
(612) 340-7951

John H. Kaul
Attorney at Law
2974 Edgewater Drive
Woodbury, MN 55125
(651) 730-1843

Attorneys for Amicus Curiae
Federal Law Enforcement Officers Association

2001 – Bachman Legal Printing ■ (612) 339-9518 ■ 1-800-715-3582 ■ Fax (612) 337-8053

No.01-685

IN THE

Supreme Court of the United States

K. DANIEL RUPP,

Petitioner,

v.

DAVID PHILLIPS,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

MOTION OF FEDERAL LAW ENFORCEMENT OFFICERS ASSOCIATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Movant Federal Law Enforcement Officers Association. ("FLEOA") hereby seeks leave to file a brief *amicus curiae* in support of the Petition of K. Daniel Rupp for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.[1]

---

[1]Petitioner has consented to this *amicus* brief.

The FLEOA is a voluntary, non-partisan professional association representing approximately 19,000 federal law enforcement officers and special agents from over fifty-seven agencies of the federal government. These agencies include the U.S. Secret Service; Bureau of Alcohol, Tobacco and Firearms; Internal Revenue Service - Criminal Investigations and Inspection; U.S. Customs, Drug Enforcement Administration; Federal Bureau of Investigation; Immigration and Naturalization Service; U.S. Marshals Service; Postal Inspection Service; Probation and Pretrial Services; Naval Criminal Investigative Service; Coast Guard Investigative Service; the Diplomatic Security Service in the State Department; U.S. Park Police - DOI; Bureau of Land Management - Special Agents and Rangers; Defense Criminal Investigative Service and the Offices of Inspector General at the following departments: Agency of International Development, Agriculture, Commerce, Defense, Education, Energy, Environmental Protection Administration, Federal Deposit Insurance Corporation, Federal Emergency Management Agency, General Accounting Office, General Services Administration, Health and Human Services, Social Security Administration, Housing and Urban Development, Interior, Justice, Labor, Transportation and Treasury.

The law enforcement officers and special agents who are members of FLEOA and their associates are a significant part of the federal vanguard against domestic and international terrorism and the use of weapons of mass destruction in the United States. FLEOA members conduct investigations involving all aspects of criminal and terrorist activity and know firsthand the importance, and often the absolute necessity, of public cooperation in these investigations. Their years of experience have taught them that while other investigative

techniques can often assist in the conduct of successful investigations, and occasionally substitute for public cooperation, there is often no reasonable alternative to obtain the information in a timely and accurate manner.

The FLEOA believes the Tenth Circuit decision forces public employee witnesses to make decisions about the importance of their information and the necessity of their cooperation with law enforcement that they cannot reasonably make at the time they provide the information and cooperation. Indeed, federal law enforcement officers often cannot make that judgment at the time the information and cooperation is offered. Moreover, the Tenth Circuit decision makes the unfounded assumption that by merely reporting some information about a matter involving weapons of mass destruction that federal law enforcement authorities will be able to supplant the citizen-witness information and cooperation with other similar cooperation or by use of other investigative techniques. The collective experience of FLEOA members is to the contrary.

Finally, the FLEOA believes that if the government is to continually exhort the public for information and cooperation, often characterized as a public duty, there should be a corresponding right of the public, including public employees, to provide that information and cooperation, especially in matters involving significant threats to the public or the use of weapons of mass destruction and that any restriction of this right should be examined under the strict scrutiny standard.

Respectfully submitted,

Eric J. Magnuson
Counsel of Record
John R. Neve
Rider, Bennett, Egan & Arundel, LLP
333 South Seventh Street, Suite 2000
Minneapolis, MN 55402
(612) 340-7951

John H. Kaul
Attorney at Law
2974 Edgewater Drive
Woodbury, Minnesota 55125

Counselors for the Federal Law Enforcement Officers Association

Dated: December 10, 2001

No.01-685

IN THE

Supreme Court of the United States

K. DANIEL RUPP,

Petitioner,

v.

DAVID PHILLIPS,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

BRIEF OF *AMICUS CURIAE*
FEDERAL LAW ENFORCEMENT OFFICERS
ASSOCIATION
IN SUPPORT OF PETITIONER

QUESTIONS PRESENTED

Amicus Federal Law Enforcement Officers Association believes that certiorari should be granted on the following questions, which are fairly encompassed by the Petition's questions presented:

1. May government employees be fired, without legal recourse, for cooperating with law enforcement's efforts to prevent domestic terrorism?

2. May a court decide as a matter of law that the compelling national interest in safeguarding citizen cooperation with law enforcement officers in the prevention of terrorism is outweighed by a federal public defender's asserted interest in prohibiting such cooperation?

3. Does a public employee have a general right to cooperate with law enforcement and under what circumstances may that right be circumscribed?

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED iv

INTEREST OF *AMICUS* 1

REASONS FOR GRANTING THE WRIT 1

I. THE TENTH CIRCUIT'S RATIONALE FORCES PUBLIC EMPLOYEES TO MAKE THE IMPOSSIBLE DECISION OF WHETHER THEIR INFORMATION AND COOPERATION IN A CRIMINAL OR NATIONAL SECURITY INVESTIGATION OUTWEIGHS THE INDIVIDUAL INTERESTS OF THE OFFICE FOR WHICH THEY WORK 2

II. LAW ENFORCEMENT OFFICERS SHOULD NOT BE REQUIRED TO DECIDE WHETHER THE PUBLIC EMPLOYEE WITNESS HAS INFORMATION OR CAN PROVIDE COOPERATION OF SUFFICIENT VALUE TO WITHSTAND A TERMINATION ACTION BY THE EMPLOYEE'S OFFICE 4

III. THE TENTH CIRCUIT MADE INCORRECT ASSUMPTIONS ABOUT THE IMPORTANCE OF CONTINUED COOPERATION BY PUBLIC EMPLOYEE WITNESSES 6

IV. A GENERAL RIGHT TO COOPERATE WITH LAW ENFORCEMENT SHOULD BE RECOGNIZED AND ARTICULATED 9

CONCLUSION 11

TABLE OF AUTHORITIES CITED

Cases:

Connick v. Myers,
461 U.S. 138 (1983) 2

Pickering v. *Bd. Of Educ.*,
391 U.S. 563 (1968) 2

Rupp v. Phillips,
No. 99-3355, 2001 WL 826656,
(10th Cir. July 23, 2001) 2, 4-6, 8, 9

United States v. Harris,
403 U.S. 573 (1971) 7

Other Authorities:

18 U.S.C. §§ 2510 - 2522 8

50 U.S.C. §§ 1801 8

INTEREST OF *AMICUS*

The interest of *amicus* Federal Law Enforcement Officers Association ('FLEOA") is set forth in the accompanying motion for leave to file this brief.[1]

REASONS FOR GRANTING THE WRIT

The tragic events of September 11, 2001 and the subsequent deaths from weapons grade or near weapons grade anthrax have brought home to the public the threat of terrorism and the effect that the use, or even the threat of the use, of weapons of mass destruction can have on the populace, the economy and the government. However, these events have not changed the fundamental nature of successful investigations, but have only emphasized the importance of those investigations.

Amicus FLEOA fully supports the First Amendment and public policy reasons for granting the writ set forth Rupp's Petition for Certiorari and makes the following observations:

---

[1]This brief has been authored entirely by counsel for *amicus* FLEOA, and no other person or entity has made any monetary contribution to its preparation or submission.

I. THE TENTH CIRCUIT'S RATIONALE FORCES PUBLIC EMPLOYEES TO MAKE THE IMPOSSIBLE DECISION OF WHETHER THEIR INFORMATION AND COOPERATION IN A CRIMINAL OR NATIONAL SECURITY INVESTIGATION OUTWEIGHS THE INDIVIDUAL INTERESTS OF THE OFFICE FOR WHICH THEY WORK

The Tenth Circuit concluded that "Mr. Rupp's continued cooperation with the FBI did not implicate the same level of public concern as the speech of employees who expose official wrongdoing or participate in protected political activity." *Rupp v. Phillips*, No. 99-3355, 2001 WL 826656, at *7 (10th Cir. July 23, 2001). The Tenth Circuit believed that the four part test set forth in *Pickering* v. *Board of Education of Township High School District 205,* 391 U.S. 563 (1968) and *Connick v. Myers,* 461 U.S. 138 (1983) required it to balance the "specific public concern with Mr. Rupp's continued participation in this investigation" with the interests of the Federal Public Defenders Office. *Rupp*, 2001 WL 826656, at *6. Presumably, then, to avoid termination, Rupp would have been required to perform the same analysis at the time of his cooperation.

Almost no public employee will ever have sufficient information or expertise to make such a decision. The public employee is in a poor position to judge the importance of his information to law enforcement. In many situations law enforcement will not tell witnesses how singular their information is, how it fits into any investigation and whether that investigation is important, or even whether there is an investigation. In other circumstances, law enforcement will seek the continued cooperation of the witness, but provide the

witness little or no information about the nature, importance, or direction of the investigation much less the importance of their cooperation. These measures are taken to protect the investigation, protect the privacy of others, and to ensure that multiple sources, if they exist, are providing independent information. The witness can reasonably conclude that by seeking continued cooperation, law enforcement believes the cooperation is valuable, but the witness often will have no way to know to what degree. To then require the public employee to weigh the decision of whether to cooperate with an investigation of the use of weapons of mass destruction against the instructions of a superior not to cooperate puts the public employee in an impossible position.

Moreover, if guided by the Tenth Circuit's rationale, public employees will have to come to the counterintuitive conclusion that the rather mundane interests of their office will take precedence over information and cooperation with law enforcement, even in investigations involving significant threats to the public and the use of biological weapons of mass destruction. Hopefully most will choose as Rupp did, to place the interest of the public ahead of their own personal interests in continued employment, but that sacrifice should not be required.

II. LAW ENFORCEMENT OFFICERS SHOULD NOT BE REQUIRED TO DECIDE WHETHER THE PUBLIC EMPLOYEE WITNESS HAS INFORMATION OR CAN PROVIDE COOPERATION OF SUFFICIENT VALUE TO WITHSTAND A TERMINATION ACTION BY THE EMPLOYEE'S OFFICE

The Tenth Circuit recognized that the FBI continued to seek Rupp's cooperation knowing that Rupp's position with the Federal Public Defender's Office was at risk. *Rupp*, 2001 WL 826656, at *2. In fact, the FBI assured Rupp that he could not be terminated for his cooperation. *Id.* In the instant case, it appears that the FBI wanted Rupp's full cooperation, but tried, unsuccessfully, to accommodate his job concerns, by scaling back on his participation in the investigation.

The Tenth Circuit failed to recognize the impossible burden it has created for law enforcement officers who know that public employees who cooperate with them may face termination for their cooperation. The officer may have no way of knowing at the outset whether the public employee witness has unique access to timely information. The officer may not even know if there are other ongoing investigations of the subject. The officer may have no means of determining whether other witnesses can be developed, whether other investigative techniques will succeed, and whether the ability to use other techniques would depend upon the witness, such as providing probable cause for warrants and wiretaps at a later date.

Even if the law enforcement officer is in the unlikely position of being able to assess the importance of the public

employee witness' cooperation, he will almost assuredly be unable to make an informed decision of whether the interests of the employee's office outweigh the interests of the investigation. His analysis will understandably be colored by his duties. This issue could possibly be resolved through contact with the employer, which is not always feasible, but becomes a hopeless conundrum once the employer has threatened termination and contacts between the employer and law enforcement cease, as they did in this case.

Apparently, to date, the tactics chosen by the FBI have been successful insofar as Tobiason is not known to have carried out his threats. Nevertheless, over time, requiring law enforcement officers to make these decisions will likely cause them to either forego seeking cooperation which will later prove to have been vital to the investigation or going forward knowing that the public employee's position is at risk.

The Tenth Circuit attempts to hedge the balancing test by stating that "if there had been some indication that Mr. Rupp's continued assistance with the investigation was imperative, our balancing assessment could well be different." *Rupp*, 2001 WL 826656, at *7 n.2. The FLEOA believes that an "imperative" standard is far too strict for judging the importance of witness cooperation, and an almost unreachable standard at the outset of an investigation. Had Tobiason carried out his threats, then most law enforcement officers would conclude that Rupp's full cooperation would have been imperative in order to prevent the use of biological weapons, but the FBI could not know that at the time of Rupp's cooperation. The public employee witness' position and the law enforcement officer's judgment on the value of the cooperation become contingent upon the actions of

the subject of the criminal or terrorism investigation rather than their current assessment of the situation.

III. THE TENTH CIRCUIT MADE INCORRECT ASSUMPTIONS ABOUT THE IMPORTANCE OF CONTINUED COOPERATION BY PUBLIC EMPLOYEE WITNESSES

The Tenth Circuit concluded that "once Mr. Rupp had tipped the FBI, it was certainly capable of carrying out an investigation of Mr. Tobiason with or without Mr. Rupp's help." *Rupp*, 2001 WL 826656, at *7. The Tenth Circuit further concluded that his continued contact with the FBI was not speech that was "as new or as irreplaceable as the most protected types of speech." *Id.*

The FLEOA believes the Tenth Circuit erred in not placing value on Rupp's continued cooperation. Obviously, the FBI would continue with its investigation of Tobiason based on the seriousness of the information Rupp provided about Tobiason's threats to use biological weapons of mass destruction. The assumption of the Tenth Circuit that all law enforcement needs is a tip belies the experience of the members of the FLEOA. Members of the public with unique and timely access to information are often irreplaceable as sources of information. The determination of whether continued cooperation is valuable or essential must be made when the information or cooperation is offered, not years later when the results of the investigation are known.

The FLEOA wishes to emphasize to the Court the importance of the nature of the information provided by Rupp, the importance of continued cooperation by members of the

public, including public employees, who are willing and able to cooperate. It is frequently difficult, if not impossible, to replace the crucial information that cooperating individuals such as Rupp can provide.

It is the experience of the FLEOA membership that human intelligence is often the best source of information. This Court has long dealt with issues of confidential informants and witnesses and their importance in establishing probable cause for search and arrest warrants. As Justice Harlan noted in *United States v. Harris*, 403 U.S. 573 (1971), "the ordinary citizen who has never before reported a crime to the police may, in fact, be more reliable than one who supplies information on a regular basis." *Id.* at 599 (Harlan, J. dissenting). The courtyard wall of FBI Headquarters bears the following inscription:

> The most effective weapon against crime is cooperation ... the efforts of all law enforcement agencies with the support and understanding of the American people.

Most criminals and terrorists attempt to cloak their activities, revealing their activities only to a finite number of associates or by inadvertence or successful investigation. Law enforcement has only that finite pool of human intelligence from which to draw, usually drastically reduced by the unwillingness of most of the knowledgeable people to cooperate. In cases of terrorism or weapons of mass destruction, witnesses such as Rupp are not fungible. Even resource intensive efforts may not succeed in finding another person with the degree of access that the original witness had who is willing to cooperate. Even if a second witness or

cooperating person can be developed, significant amounts of time may pass without law enforcement knowing about the activities of the suspect, leaving the public at great risk.

Searches, seizures, wiretaps, analysis of records, surveillance, and a myriad of other investigative techniques are effective, and sometimes sufficient, but in the vast majority of investigations, witnesses are the most essential element of the successful investigation. Direct and timely access to information of the nature provided by Rupp is often singular no matter what efforts of law enforcement follow. Rupp clearly was in a position to give more cooperation than he was permitted to give by his employer. For example, Rupp was in a position to be "wired." *Rupp*, 2001 WL 826656, at *6. Electronically recorded oral conversations are highly valuable as evidence, but can only be obtained by someone who can volunteer to engage the subject of the investigation in conversation or through the much more difficult to obtain non-consensual electronic surveillance requiring court authorization under the provisions of 18 U.S.C. §§ 2510 - 2522 (commonly referred to by law enforcement as Title III) or the Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801 *et seq.* No one may have been in the position to voluntarily record conversations with Tobiason except Rupp, and, in any event, neither Rupp nor the FBI could know at the time of Rupp's cooperation whether another witness could be developed.

It is unclear to the FLEOA why subsequent information provided by Rupp would be afforded less value than his initial information. It is the experience of the members of the FLEOA that the value of information from cooperating witnesses often increases exponentially as their cooperation progresses. They become more trusted by the subject who reveals more of his

operations to the witness. Law enforcement has the opportunity to assess the behavior and truthfulness of the witness and to corroborate their information. The witness becomes more comfortable with a stressful and sometimes very threatening situation and can thus be tasked or requested to take additional steps to obtain evidence. After a time, they can introduce the subject to law enforcement officers acting in undercover capacities. Subjects identify and even introduce the witnesses to co-conspirators. Such developments are often crucial to a successful investigation and they take repeated contacts over long periods of time.

The FLEOA strongly believes that human sources of intelligence are very often the most valuable source of evidence available in an investigation, and that continued cooperation of witnesses, including public employees, is highly valuable in almost all investigations and should be so considered when used in any balancing analysis against other interests.

IV. A GENERAL RIGHT TO COOPERATE WITH LAW ENFORCEMENT SHOULD BE RECOGNIZED AND ARTICULATED

The decision of the Tenth Circuit essentially finessed the issue of whether Mr. Rupp's continuing cooperation with the FBI constituted speech. *Rupp*, 2001 WL 826656, at *5, *5 n.1, resolving the matter instead based on a balancing of interests test. The Tenth Circuit clearly struggled with the issue and the parties argued the matter. Our review of the numerous cases involving public employee involvement with law enforcement resulting in adverse job actions against the employee reveals that these cases are decided on the basis of the free speech provisions of the First Amendment, even if more than simple

speech was involved, *e.g.*, continued cooperation, direction from law enforcement, etc.

The FLEOA believes that this Court should articulate and recognize a general right of the public to cooperate with law enforcement and place it on a level with the right to participate in the political process. The President, the Attorney General, governors, heads of federal, state, and local law enforcement agencies, and representatives continually call for the cooperation of the general public with law enforcement's efforts to fight crime and terrorism, often characterizing it as a public duty. The FLEOA believes there should be an articulated corresponding right for the public, including public employees, to provide that cooperation. That right should go beyond the right to speak on matters of public concern; it should incorporate the right to act in concert with law enforcement and other governmental authorities in a lawful manner. This participatory right should be afforded status similar to the right of public employees to engage in the political process, and any limitations place upon that right should be examined under the strict scrutiny standard.

CONCLUSION

This case presents important questions for the Court's consideration, which impact individuals, law enforcement, and public safety. The ability of public employees to cooperate with law enforcement has clearly been put at risk. The practical effect of the Tenth Circuits rationale on law enforcement's use of public employees to investigate terrorism and the use of weapons of mass destruction could be devastating. The need for clear and unequivocal guidance on these issues from this Court supports the grant of certiorari.

Respectfully submitted,

Eric J. Magnuson
Counsel of Record
John R. Neve
Rider, Bennett, Egan & Arundel, LLP
333 South Seventh Street, Suite 2000
Minneapolis, MN 55402
(612) 340-7951

John H. Kaul
Attorney at Law
2974 Edgewater Drive
Woodbury, Minnesota 55125

Counselors for the Federal Law Enforcement Officers Association

Dated: December 10, 2001